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U.S. Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

FILE: EAC 02 155 52545 Office: VERMONT SERVICE CENTER Date: FEB 25 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is an information technology consulting firm. The beneficiary was previously approved for an L-1B visa under a blanket petition, and has been temporarily employed by the petitioner as an applications software analyst and programmer at an annual salary of $44,097.00. The petitioner seeks to extend the beneficiary's classification as an L-1B intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1101(a)(15)(L).

The director denied the petition concluding that the beneficiary is not employed in a position that involves specialized knowledge. Specifically, the director stated that the petitioner had failed to demonstrate that the procedures used by the beneficiary are significantly different from the methods generally used in other technology consulting firms, or that the beneficiary's understanding of the petitioning organization's processes constitutes specialized knowledge. The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review.

On appeal, counsel for the petitioner asserts that the director improperly applied the relevant statute to the evidence previously submitted to establish the beneficiary's specialized knowledge capacity. Counsel further contends that the director failed to examine the record, and that the decision to deny the petition contradicts legislative history.

To establish eligibility for the nonimmigrant L-1 visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education,

training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the beneficiary possesses "specialized knowledge" as defined in the Act and the regulations.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the following:

> For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines "specialized knowledge" as:

> [S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

A "specialized knowledge professional" is further defined at 8 C.F.R. § 214.2(l)(1)(ii)(E) as:

> [A]n individual who has specialized knowledge as defined in paragraph (l)(1)(ii)(D) of this section and is a member of the professions as defined in section 101(a)(32) of the Immigration and Nationality Act.

In a letter attached to the petition, the petitioner, Tata Consultancy Services (TCS), outlined the following job responsibilities of the beneficiary as an applications software analyst and programmer:

- Utilize IPMS, PAL, BAL, (web-based systems) to customize the TCS' internally developed, SEI-CMM assessed (level 5) software development and maintenance process to meet project operational process requirements
- Use Project Planning Guidelines, Project Plan Template, Software Development Life Cycle Models document, and Guidelines for Software Estimation, etc. (all available in IPMS, PAL, BAL) to establish Software Project Plan
- Prepare monthly status reports on effort and status of planning
- Enter Status Report into IPMS database
- Establish Software Project Tracking and Oversight as per outlines in Quality Manual
- Track and review software accomplishments and results against documented estimates and adjust plans based on actual accomplishments and results
- Coordinate and implement Software Configuration Management (SCM) activities as outlined in TCS' Quality Manual
- Ensure that changes to all configurable items are done as per TCS' Change Control Procedure
- Conduct Final Inspection before releasing software work items

- Prepare Software Quality Assurance (SQA) plan as per guidelines in TCS' Quality Manual
- Conduct final inspections to ensure compliance with the project's SQA plan
- Use IPMS to monitor the status of SQA activities
- Interact with clients to gather and finalize requirements specifications
- Prepare specifications for offshore development
- Identify and allocate work for offshore development
- Coordinate the uploading of specifications for offshore development
- Provide technical guidance to offshore resources as required
- Review Defect Prevention (DP) activities fortnightly
- Conduct Peer reviews, as per IPMS, DP Checklist, guidelines for software product quality, project plan template, etc., of work product produced onsite and offshore
- Escalate issues as may be required
- Ensure that deliverables are handed over to client within agreed upon parameters

In regards to the beneficiary's qualifications, the petitioner further provided that as a prerequisite to employment as an applications software analyst and programmer, the petitioner requires a baccalaureate degree in computer science, computer information systems, or a relevant engineering discipline. An attached resume indicated that the beneficiary possesses a Bachelor of Technology in Mechanical Engineering. During the beneficiary's employment with the foreign company, which began in August 1999, she has worked on various projects involving Windows 95/NT, DOS and UNIX operating systems, and programming languages, such as C, PL/SQL, VB 5.0/6.0, HTML, and Cold Fusion. Counsel also claimed that during the beneficiary's tenure with the foreign company she was exposed to the Software Engineering Institute's (SEI) Capability Maturity Model for Software (CMM) assessed (Level 5) software development process used by several of the foreign company's offshore development centers.

In a request for evidence, the director noted that the record did not sufficiently establish that the beneficiary possessed specialized knowledge. The director requested that the petitioner submit evidence establishing that: (1) the beneficiary's knowledge is uncommon, and not generally known by practitioners in the beneficiary's field; (2) the beneficiary is qualified to contribute to the petitioner's knowledge of foreign operating conditions as a result of special knowledge not generally found in the industry; (3) the beneficiary has been employed abroad in a capacity involving significant assignments which have advanced the employer's productivity, competitiveness, image, or financial position; (4) the beneficiary possesses knowledge that can normally be gained only through prior experience with that particular employer; and, (5) the beneficiary possesses knowledge of a product or process that cannot be easily transferred to another individual. The director further stated that the evidence must substantiate that the beneficiary's advanced level of knowledge of the petitioner's processes and procedures distinguishes her from those with only basic knowledge.

In response, the petitioner's counsel submitted a lengthy statement again asserting that the beneficiary has an advanced level of knowledge of the petitioning company's processes and procedures relating to quality assurance standards. Counsel gave a detailed description of the beneficiary's work experience and job duties, most of which has already been provided above. Specifically, counsel claimed that the petitioner employs 19,000 information technology workers, of which half have received training in the company's SEI-CMM Level 5 software development and maintenance processes. Counsel contended that the beneficiary is one of the information technology professionals to have received this specialized training, as well as training in

fifteen key process areas. In regards to the SEI-CMM Level 5 assessed software development and maintenance process, counsel explained:

> Level 5 assessment on the Software Engineering Institute's Capability Maturity Model is the highest and most sought after quality assurance standard in the information technology industry worldwide, and [the petitioner] is one of very few firms that have achieved it. The project [the beneficiary] has been undertaking in the U.S. requires specialized knowledge of [the petitioner's] SEI-CMM Level 5 assessed software development and maintenance process, as it is customized to meet the operational requirements of individual projects.

Additionally, counsel contended that the beneficiary's knowledge, experience, skills, and training differentiate her from "that of a typical Applications Software Analyst/Programmer." Counsel further asserted that these qualities also satisfy the characteristics of an individual who possesses specialized knowledge, as outlined in a 1994 Immigration and Naturalization Service (now CIS) memorandum written by the Acting Associate Commissioner.

In his decision, the director concluded that the record did not establish that the beneficiary has been or will be employed in a specialized knowledge capacity, as required for classification as an L-1B intracompany transferee. Upon reviewing the detailed description of the beneficiary's job responsibilities, the director determined that the job duties are not significantly different from those of other applications software analysts in computer consulting firms, and do not "warrant the expertise of someone possessing a truly specialized knowledge." The director noted that the petitioner's explanation of the beneficiary's duties seemed to merely paraphrase the definition of specialized knowledge. The director also concluded that the petitioner had failed to document how the beneficiary's knowledge of the processes and procedures of the petitioning organization are advanced or substantially different from the knowledge possessed by other applications software analysts employed by the petitioner. Consequently, the director denied the petition.

On appeal, counsel for the petitioner submits a brief in which he asserts that the director's denial of the petition contradicts prior guidance for interpreting the statutory definition of specialized knowledge. First, counsel claimed that the legislative history clearly indicates that the specialized knowledge category was not to be restricted to those rare employees with unusual knowledge of an organization's exclusive processes and techniques. Rather, counsel contended that the classification for intracompany transferees was intended to assist foreign companies that were locating to the United States, and would experience difficulty hiring personnel familiar with the practices of the company.

Additionally, counsel asserted that the beneficiary's knowledge of the petitioner's SEI-CMM Level 5 assessed software development and maintenance process is advanced, as this knowledge is different from that generally found in the software sector in the United States and worldwide. In support of this assertion, counsel again noted that the petitioning organization has fifteen offshore development centers that have been assessed at SEI-CMM Level 5. Level 5, the highest rating, represents an organization whose processes are optimized, while a Level 1 rating represents processes that are random. According to counsel, "the SEI-CMM is the most sought after assessment of an organization's software quality processes and capabilities." Therefore, although the processes used by the petitioner are neither exclusive nor proprietary, counsel

contends that the Level 5 rating establishes that the petitioner "utilizes a software development and maintenance process that is not commonly known or utilized in the software industry."

Counsel further stated that "having established that [the petitioner] utilizes a sophisticated process virtually unknown in the software development and maintenance sector in the United States, it is reasonable to assume that anyone possessing knowledge of such a process intrinsically possesses *advanced knowledge* . . . ." (italics in original). Counsel acknowledged that the computer hardware and software systems used by the beneficiary on assignments is comparatively common in the industry, yet another individual with this knowledge would still need significant training in utilizing the petitioner's software process before competently performing the duties required for the beneficiary's position. Counsel asserted that it is the beneficiary's combination of general and company-specific knowledge that constitutes specialized knowledge, which is not readily transferable to another individual.

Counsel also compared the present case to an example outlined in a 1994 memorandum written by the INS' Acting Associate Commissioner. Counsel claimed that, in the present case, the beneficiary's knowledge is consistent with that of the alien identified in the memorandum, as she possesses a combination of general knowledge and knowledge of the company's internal procedures, which renders her essential to the organization. Therefore, counsel asserted that the beneficiary should be deemed to possess specialized knowledge.

On review, the petitioner has not established that the beneficiary has been and will be employed in a specialized knowledge capacity as required in 8 C.F.R. § 214.2(l)(3)(ii).

In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed description of the services to be performed sufficient to establish specialized knowledge. *Id.* In the present case, the petitioner submitted a list of job duties, which have been outlined above. The petitioner claimed that in order to satisfactorily execute these job duties, a minimum of a baccalaureate degree in engineering is required. Such a requirement "is consistent with industry standards" and mandated by the complexity of the computer systems design methodologies. The petitioner did not indicate that additional education or training would be necessary to successfully perform the job responsibilities of an applications software analyst.

The petitioner's description of the beneficiary's job duties fails to establish that an individual who possesses specialized knowledge is necessary for the position of applications software analyst. Additionally, the qualifications necessary for the beneficiary to successfully perform her job as an applications software analyst and programmer are nothing more than standard. The petitioner asserted that the one criterion necessary to successfully execute the job duties of an applications software analyst is a bachelor's degree in engineering. The petitioner further claimed that this is an industry standard. It is therefore a reasonable conclusion that the beneficiary's educational background is equivalent to that of other applications software analysts, and that the beneficiary's training in SEI-CMM Level 5 processes is not essential to the performance of the proffered job. The petitioner has failed to differentiate the beneficiary's knowledge from that of others in the industry. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, counsel asserts on appeal that the beneficiary's knowledge, experience, skills, and training differentiate her from "that of a typical Applications Software Analyst/Programmer." However, counsel has failed to provide any description of the skills or training of a typical applications software analyst. The lack of evidence in the record makes it impossible to draw a comparison between the two positions, and precludes a finding that the beneficiary's knowledge is different from that of a "typical applications software analyst/programmer." Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* Also, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the director correctly concluded that the beneficiary's job duties do not distinguish the beneficiary from other applications software analysts.

Moreover, there is no evidence in the record, such as a course certification or company training records, to establish that the beneficiary actually received SEI-CMM level 5 training or attended any in-house training courses. Counsel merely asserts that the beneficiary is one of a group of approximately 9,500 information technology professionals to have received the SEI-CMM Level 5 training. Without documentary evidence to support the claim, the assertion of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena, supra; Matter of Ramirez-Sanchez, supra.* Once again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* The petitioner has failed to document that the beneficiary has actually received the petitioner's SEI-CMM Level 5 training, the basis for the beneficiary's claim to specialized knowledge. For this reason alone, the petition may not be approved.

On appeal, counsel also refers to a 1994 INS memorandum as a guide for interpreting the statutory definition of specialized knowledge. Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). In the memorandum, the Commissioner noted that specialized knowledge is not limited to knowledge that is proprietary, exclusive or unique, but also includes knowledge that is "different from that generally found in [a] particular industry." Counsel argues that the beneficiary's training in the petitioner's SEI-CMM Level 5 assessed software development and maintenance process establishes that the beneficiary's knowledge is "different from that generally found in the software sector not only in the United States but internationally."

The beneficiary's ability to execute Level 5 assessed software development and maintenance processes does not by itself establish that the beneficiary's knowledge is different from that generally found in the industry. The Software Engineering Institute is a research and development center that offers, among other things, education and training classes organized to aid companies in determining their ability to develop and maintain their software products. *See* SEI Education and Training, Introduction to the Software CMM, http://www.sei.cmu.edu/products/courses /info/intro.cmm.html, (last updated Nov. 4, 2003). Because SEI is a voluntary training facility, any software company can purchase a report on how to perform software process assessments and train its employees in order to receive a Level 5 rating. Although requested by the director, counsel failed to provide evidence that the beneficiary possesses knowledge that can normally be gained only through prior experience with the petitioning organization. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Although it may be difficult for an organization to achieve Level 5 status, the knowledge to gain that status is widely available and can be "generally found in the industry."

Finally, with regard to counsel's reliance on the 1994 Associate Commissioner's memorandum, it is noted that the memorandum was intended solely as a guide for employees and will not supercede the plain language of the statute or the regulations. Although the memorandum may be useful as a statement of policy and as an aid in interpreting the law, it was intended to serve as guidance and merely reflects the writer's analysis of the issue. Counsel also acknowledges such in his brief on appeal in which he states that the 1994 memorandum was "intended to provide Service Centers, field offices, and the AAO *with guidance in interpreting the statutory definition of specialized knowledge* . . . ." (emphasis added). Therefore, by itself, counsel's assertion that the beneficiary's qualifications are analogous to the examples outlined in the memorandum is insufficient to establish the beneficiary's qualification for classification as a specialized knowledge professional. Specifics are clearly an important indication of whether a beneficiary's duties encompass specialized knowledge; otherwise meeting the definition would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As discussed, the petitioner has not submitted probative evidence to establish that the beneficiary's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known in the alien's field of endeavor.

Counsel also contends on appeal that the legislative history dictates that the specialized knowledge classification should not be limited to those "relatively rare employees" of an organization who possess unique knowledge of the company's exclusive processes and techniques. Counsel claims that the L-1B classification was instead intended to assist companies locating in the United States in transferring their present personnel who already had knowledge of its operations. Therefore, counsel asserts that the director's decision contradicts the legislative history interpreting the term specialized knowledge.

While the AAO acknowledges that the specialized knowledge classification is not solely for those "relatively rare employees with unusual knowledge," the legislative history for the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In *1756, Inc. v. Attorney General*, 745 F. Supp. 9 (D.D.C. 1990), the court upheld the denial of an L-1 petition for a chef, where the petitioner claimed that the chef possessed specialized knowledge. The court noted that the legislative history demonstrated a concern that the L-1 category would become too large: "The class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated and monitored by the Immigration and Naturalization Service." *Id.* at 16 (citing H.R. REP. No. 91-851, 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815). The court stated, "[I]n light of Congress' intent that the L-1 category should be limited, it was reasonable for the INS to conclude that specialized knowledge capacity should not extend to all employees with specialized knowledge. On this score, the legislative history provides some guidance: Congress referred to 'key personnel' and executives." *1756, Inc.*, 745 F. Supp. at 16.

Similarly, in *Matter of Penner*, the Commissioner emphasized that the specialized knowledge worker classification was not intended for "all employees with any level of specialized knowledge." 18 I&N Dec. 49 (Comm. 1982). According to *Matter of Penner*; "[s]uch a conclusion would permit extremely large numbers of persons to qualify for the 'L-1' visa" rather than the "key personnel" that Congress specifically intended.

Id. at 53. In accordance with the statute and the legislative history, it would be inappropriate to expand the visa category to allow the entry of any personnel who already had knowledge of a petitioner's operations.[1]

If the AAO were to follow counsel's reasoning, then any employee would qualify for a specialized knowledge visa if that employee had experience working for a company with special accreditation, such as SEI-CMM Level 5. The evidence presented indicates that thirty-seven software engineering firms have attained SEI-CMM Level 5 certification. To assert that any employee of these firms should qualify for an L-1B visa would fundamentally alter the nature of the visa classification. Such an expansion of the term "specialized knowledge" would transform the visa classification from one for aliens with specialized knowledge to one for any employee working for an enterprise with special accreditation. In short, counsel's interpretation of the regulations improperly emphasizes a firm's accreditation rather than an employee's specialized knowledge.

Furthermore, it should be noted that Congress' 1990 amendments to the Act did not specifically overrule *1756, Inc.* nor any other administrative precedent decision, nor did the 1990 amendments otherwise mandate a less restrictive interpretation of the term "specialized knowledge." The House Report, which accompanied the 1990 amendments, stated:

> One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company.

H.R. REP. No. 101-723(I), 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418. As previously noted, the statutory definition states, "an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company." 8 U.S.C. § 1184(c)(2)(B).

Prior to the Immigration Act of 1990, the statute did not provide a definition for the term "specialized knowledge." Instead, the regulations defined the term as follows:

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[1] The precedent decision *Matter of Penner* pre-dates the 1990 amendment to the definition of "specialized knowledge." Other than deleting the former requirement that specialized knowledge had to be "proprietary," however, the 1990 amendment did not greatly alter the definition of the term. In particular, the 1990 Committee Report does not even support the claim that Congress "rejected" the INS interpretation of "specialized knowledge." The 1990 Committee Report does not criticize, and does not even refer to, any specific INS regulation or precedent decision interpreting the term. The Committee Report simply states that the Committee was recommending a statutory definition because of "[v]arying," [*i.e.*, not specifically incorrect], "interpretations by INS," H. Rep. No. 101-723(I), *supra*, at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became § 214(c)(2)(B) of the Act. *Id.* The AAO concludes, therefore, that *Matter of Penner* remains useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification.

> "Specialized knowledge" means knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the organization's product, service, research, equipment, techniques, management, or other interests of the employer are not readily available in the United States labor market. This definition does not apply to persons who have general knowledge or expertise which enables them merely to produce a product or provide a service.

8 C.F.R. § 214.2(1)(1)(ii)(D)(1990).

Although the Immigration Act of 1990 provided a statutory definition of the term "specialized knowledge," Congress did not give any indication that it intended to expand the field of aliens that qualify as possessing specialized knowledge. Although the statute omitted the term "proprietary knowledge" that was contained in the regulations, the statutory definition still calls for "special knowledge" or an "advanced level of knowledge," similar to the original regulation. Neither the 1990 House Report nor the amendments to the statute indicate that Congress intended to expand the visa category beyond the "key personnel" that were originally mentioned in the 1970 House Report. Considered in light of the original 1970 statute and the 1990 amendments, it is clear that Congress intended for the class of nonimmigrant L-1 aliens to be narrowly drawn and carefully regulated, and to this end provided a specific statutory definition of the term "specialized knowledge" through the Immigration Act of 1990.[2]

Finally, it is noted that the statutory definition still requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term "specialized knowledge" is a comparative concept and cannot be plainly defined. As observed in *1756, Inc.*, "[s]imply put, specialized knowledge is a

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[2] In addition, a review of the 1970 House Report indicates that Congress assumed that the nonimmigrant intracompany transferees would not compete with United States citizens for employment. When discussing airline personnel, for example, the Chairman noted that flight attendants on international flights would not enter the United States under an L-1 nonimmigrant classification but could enter on an international flight under a different nonimmigrant classification. The Chairman observed that the entry of flight attendants was regulated to prevent them from competing with United States citizen flight attendants. Regarding the L-1 classification, the Chairman stated that "the international personnel would not be competing, in my opinion at least, with an American worker which I think is a significant differentiation." H.R. Subcomm. No. 1 of the Jud. Comm., *Immigration Act of 1970: Hearings on H.R. 445*, 91st Cong. 222 (November 12, 1969).

Just as flight attendants do not normally enter under the L-1 classification, *Delta Airlines, Inc. v. USDOJ,* Civ. No. 00-2977 LFO (D.D.C. April 6, 2001), *summarily affirmed, Delta Airlines, Inc., v. USDOJ,* No. 01-5186, 2001 WL 1488616 (D.C.Cir. 2001), computer programmers typically enter the United States as nonimmigrant workers under the H-1B classification, which is also regulated to prevent them from unfairly competing with United States workers. *See generally* 8 C.F.R. § 214.2(h). Although not a determining factor in the present case, the beneficiary's current salary appears to be lower than the prevailing wage earned by a computer programmer employed in California, the state in which the beneficiary is presently working. *See* U.S. Dept. of Labor, Employment & Training Administration, http://www.flcdatacenter.com/owl.asp (last updated Jan. 6, 2003).

relative . . . idea which cannot have a plain meaning." 745 F. Supp. at 15. Contrary to counsel's belief that the comparison should be between the beneficiary and the industry in general, the comparison cannot be limited solely to the general labor market. The Congressional record specifically states that the L-1 category was intended for "key personnel." *See generally,* H.R. REP. No. 91-851, 1970 U.S.C.C.A.N. 2750. The term "key personnel" denotes a position within the petitioning company that is "of crucial importance." *See Webster's II New College Dictionary* 605 (Houghton Mifflin Co. 2001). In general, all employees can reasonably be considered "important" to a petitioner's enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational reason to employ that person. Accordingly, an employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. Based on the definition of "specialized knowledge" and the congressional record related to that term, the AAO must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between that employee and the remainder of the petitioner's workforce. Here, the petitioner has indicated that the beneficiary is one of approximately 9,500 employees that have received the "specialized knowledge" training, out of a workforce of approximately 19,000 information technology employees. As the petitioner indicates that at least half of its workforce possesses "special knowledge" or an "advanced level of knowledge," the AAO must conclude that the beneficiary represents the petitioner's average employee. While it may be correct to say that the beneficiary is a highly skilled and productive employee, this fact alone is not enough to bring her to the level of "key personnel."

Counsel's expansive interpretation of the specialized knowledge provision is also objectionable, as it would allow virtually any skilled or experienced employee to enter the United States as a specialized knowledge worker. In *Matter of Penner, supra,* the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. Although the definition of "specialized knowledge" in effect at the time of *Matter of Penner* was superseded by the 1990 Act to the extent that the former definition required a showing of "proprietary" knowledge, the reasoning behind *Matter of Penner* remains applicable to the current matter. The decision noted that the 1970 House Report, H.R. No. 91-851, was silent on the subject of specialized knowledge, but that during the course of the sub-committee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed "L" category. In response to the Chairman's questions, various witnesses responded that they understood the legislation would allow "high-level people," "experts," individuals with "unique" skills, and that it would not include "lower categories" of workers or "skilled craft workers." *Matter of Penner, supra* at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., *Immigration Act of 1970: Hearings on H.R. 445,* 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)). Reviewing the congressional record, the Commissioner concluded that an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. For the same reasoning, the AAO cannot accept the proposition that any skilled worker is necessarily a specialized knowledge worker.

In the present case, an evaluation of the record reveals that other software companies have achieved an SEI-CMM Level 5 rating, that the claimed specialized knowledge is itself widely available, and that other organizations, although not assessed at a SEI-CMM Level 5, may employ workers with knowledge equivalent to that of the beneficiary. It is further noted that the petitioner claims that the beneficiary is one of approximately 9,500 information technology professionals to have received the SEI-CMM Level 5 training, thereby raising doubts that the beneficiary should be considered "key personnel." Finally, the petitioner has failed to document that the beneficiary has actually received the petitioner's SEI-CMM Level 5 training, the

basis for the beneficiary's claim to specialized knowledge. Thus, as the petitioner has not established that the beneficiary possesses a special knowledge of the petitioner's product or an advanced level of knowledge of the company's processes or procedures, the director reasonably determined that the beneficiary does not qualify as a specialized knowledge worker.

It is noted that the current petition is for an extension of an L-1B petition that was previously approved by the director. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Even if a service center director has approved a nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.